

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14/10/2003

CORAM

THE HONOURABLE MR. JUSTICE V.KANAGARAJ

Second Appeal No.1855 of 1991

1. Subbiah
2. Pitchiah ... Appellants

-Vs-

1. Amaravathy
2. Malathy
3. Minor Rathi Devi
4. Minor Balaji ... Respondents

(Respondents 3 and 4 are represented by their mother and guardian, the first respondent)

!For appellants : Mr. Soundarapandian for
Mr. T.M. Hariharan

For respondents: Mr. B.S. Gnanadesikan

:JUDGMENT

This Second Appeal is directed against the judgment and decree dated 2.9.1988 rendered in A.S. No.58 of 1985 by the Court of Subordinate Judge, Tenkasi, thereby decreeing the suit filed by the respondents herein, setting aside the judgment and decree dated 23.4.1984 rendered in O.S. No.167 of 1983 by the Court of District Munsif, Shencottah.

2. Tracing the history of the above Second Appeal coming to be preferred, it comes to be known that the respondents herein have filed the suit for declaration of their title to the suit properties and for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit property and for costs, on averments such as that the first schedule property was purchased by the first plaintiff from one Azhagiammal under the document dated 23.6.1944, the second schedule property is forming part of the first schedule property and the same was purchased by the first plaintiff under a document dated 26.9.1962 and he has put up a mud wall to the height of 6 feet on the eastern portion of the second schedule property; that he has planted a tree on the south eastern corner of the suit property; that the defendants have no right or title to the suit

properties and they are not enjoying the same at any point of time; that they are attempting to take a pathway in the suit properties and they claimed it as of their right on 9.3.1981 and hence the suit.

3. In the written statement filed by the defendants, they would submit that it is false to state that the second schedule of property belonged to one Azhakiayammal; that it is not stated in the plaint as to how she got the property; that Azhakiayammal is none other than the grand mother of the first plaintiff; that the second schedule property is a common pathway which the defendants are entitled for a width of 1 and 1/2 CC; that the ancestors of the defendants were also enjoying the same with the knowledge of the plaintiff that it is false to state that on the south of the defendant's house, there is a street facing east to west, there is no such street; that there is no pathway to the defendants except the pathway in the second schedule of property; that there is no cause of action to the suit; that there

is mention about the pathway in the sale deed dated 18.12.1926 in favour of Seeni Nadar. On such averments the defendants would pray to dismiss the suit with costs.

4. The learned District munsif, Shencottah, having traced the facts and circumstances of the case as pleaded by parties, has framed the following issues for determination of the questions involved in the above original suit:

- (i) Whether the suit 2nd schedule property is a common pathway to the plaintiffs and the defendants?
- (ii) Whether the first plaintiff's purchase of the property from Azhagiyammal is forgery?
- (iii) Whether the plaintiffs have constructed a wall to the height of 6 feet in the suit property as mentioned in the plan as HB?
- (iv) Whether the defendants are entitled to the pathway measuring to the width of 1 and + CC on eastern side of the suit properties?
- (v) Whether the defendants are entitled to the usage right of the 2 nd schedule of suit property?
- (vi) What reliefs the plaintiffs are entitled to?

5. The trial Court having framed the issues as brought forth above had conducted the trial in which the plaintiffs would not only examine two witnesses as PWs. 1 and 2 for oral evidence, but also would mark three documents as Exs.A1 to A3 for documentary evidence. Ex.A.1 dated 23.6.1946 being the sale deed executed by Azhakiayammal in favour of the first plaintiff, Ex.A.2 dated 26.9.1982 being the sale deed executed by Azhakiayammal in favour of the defendant, Ex.A.3 being the kist receipt dated 23.1.1981, for the year 1980-81.

6. Likewise, on the part of the defendants, the first defendant would not only examine himself as DW.1 for oral evidence, but also would mark four documents as Ex.B1 to B4. Ex.B1 dated 5.4.1971 being the sale deed executed by Periyapattan in favour of the first defendant, Ex.B.2 dated 20.2.1965 being the sale deed executed by Maruthan in favour of Periyapattan, Ex.B3 dated 5.11.1981 being the sale deed executed by Kithiroli Sahib and

others in favour of Maruthan, Ex.B4 dated 18.2.1926 being the sale deed executed by Puthiaykudumban in favour of Seen Nadar.

7. Besides the above oral and documentary evidence, the trial Court would also mark two other Court documents as Exs.C1 and C2, Ex.C1 being the Advocate Commissioner's report, Ex.C2 being the rough sketch drawn by Advocate Commissioner.

8. The trial Court having considered the oral and documentary evidence placed on record as mentioned supra would appreciate the same issue-wise and would ultimately dismiss the suit with costs. Aggrieved by the said judgment and decree of the trial Court, the plaintiffs have preferred appeal in A.S. No.58 of 1985 on the file of the Court of Subordinate Judge, Tenkasi and the said Court also tracing the oral and documentary evidence as placed before the trial Court would frame proper points for consideration.

They are:

- (i) Whether the plaintiffs have got right to the suit properties?
- (ii) Whether the plaintiffs are entitled to the relief as prayed for?

9. The first Appellate Court having appreciated the oral and documentary evidence placed on record, would find that the plaintiffs have got right to the suit properties as per Exs.A1 and A2 and the defendants have purchased the property under Ex.B1 to B3 which lies to the south of the suit properties and they have got a separate pathway as shown by the Commissioner in his plan; that the defendants have not established that they have got right of easement across the second schedule property, would decide that the plaintiffs became entitled to the reliefs as prayed for and on a overall consideration of the points framed, the appellate Court would ultimately allow the appeal with costs, thereby reversing the judgment and decree of the trial Court dated 2.8.1988 made in O.S. No.167 of 1983, further decreeing the suit as prayed for by the plaintiffs. It is only testifying the validity of the judgment and decree dated 2.9.1988 rendered in A.S. No.58 of 1 985 by the first appellate Court, the defendants have come forward with this Second Appeal on certain grounds as put forth in the grounds of appeal.

10. At the time of admission, this Court has admitted the Second Appeal for determination of the following substantial question of law: Whether in the light of the recitals in Ex.B4 and the property conveyed under that document, the plaintiffs could claim title to the property in dispute?

11. During the argument, the learned counsel appearing on behalf of the appellants would submit that it is a reversed finding of the dismissal of the suit by the trial Court in allowing the appeal preferred by the plaintiffs by the first appellate Court; that the first plaintiff says that she purchased the suit property from his grand mother by means of Exs.A1 and A2 respectively dated 23.6.1944 and 26.9.19 62 and that Exs.A1 and A2 are part and parcel of the suit property; that according to Ex.A1, the property measures 9 X 15 and + CC under Ex.A2 contends 3 X 15 and + feet; that the

trial Court held Ex.B4 is the parental document that is the sale deed dated 18.2.1986 wherein one Pudukudumban sold the properties to one Seeni Nadar and Azhagiayammal who purchased the same orally; subsequently Azhagiayammal sold under Ex.A1 on 23.6.1944 in favour of Shanmugam, her grand son. With this argument, the learned counsel would cite from typed set of papers certain relevant portions from the trial Court judgment and would ultimately pray to allow the appeal setting aside the judgment and decree passed by the first appellate Court below.

12. In reply, the learned counsel appearing on behalf of the respondents would argue to the effect whether the first appellate Court was right in setting aside the decree passed by the trial Court that the suit schedule properties are ABCD which include both the schedule A & B suit properties; that 'ABCD' is the property belonging to the respondents; that a specific plea has been taken by the appellants denying the ownership of the respondents relating to Ex.A2 dated 26.9.1962 which is a registered sale deed; that the 'B' schedule is a part of 'A' schedule property; that regarding Ex.B4, the learned counsel would point out that it is not only Ex.B4 but the documents under Ex-B1 to B4 did not refer to the second schedule of the suit property; that the trial Court is wrong in holding that the boundary recitals in Ex.B4 tallying with the plaintiff's second schedule property; that the trial Court failed to see that the defendants could not have used the second schedule property at all in view of the report filed by the Commissioner; that the defendants have no locus standi to question the right of the plaintiff regarding its Exs.A1 and A2 and there is no scope to claim easement of necessity; that South of his house, there is a pathway as shown in Ex.C2 and therefore, the learned counsel ultimately pray to dismiss the above appeal with costs.

13. In support of the above arguments, the learned counsel for the respondents would also submit the following judgments reported in AIR 1956 MADRAS 584, (Balasubramaniaswami vs.Ramaswami), AIR 1978 GUJARAT 62 (Rameshchandra Bhikabhai Patel vs. Maneklal Maganlal Patel and another), AIR 1968 SC 1165 (Nair Service Society v. K.C. Alexander). So far as the first judgment cited above is concerned, it is held in a suit to restrain the defendant from using a passage and the right of way claiming as easement of necessity, wherein it has been held that "it must be proved that there is no other access to his property by the defendant; the plea that the other mode of access is inconvenient is not a valid defence". In the second judgment cited viz., AIR 1978 GUJARAT 62, a Division Bench of the Gujarat High court has held regarding easement of necessity "easement of necessity would no longer be available when alternative way is available to the claimant of that right". The last judgment cited above is one from the Honourable Apex Court wherein it is held that the presumption of title from possession can arise only where facts disclosed no title on any party.

14. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both and adhering to the substantial question of law framed whether in the light of the recitals in Ex.B4 and the property conveyed under that directing the plaintiffs could claim title to the property in this respect. The defendants'

stand is that Ex.B4 does not at all refer to the second schedule and the trial Court has wrongly held that boundary recitals in Ex.B4 tally with the plaintiff's second schedule. However, comparing with the Commissioner's report and sketch, the lower appellate Court has held that the defendants could not have used the second schedule property and that the defendants have no locus standi to the right of the plaintiffs regarding both the schedule-I and II of the suit properties. The lower appellate Court having extracted the "Tamil version" of the boundary recitals from Ex.B4 would hold that the measurements given in Ex.B4 is only a rough measurement and would further hold that Ex.A2 dated 26.9.1962 under which the second schedule property had been conveyed measuring 3 CC East-West and 15 CC North-South. It is to be noted that on the date of Ex.A2, no dispute was in existence between the parties and the dispute arose only in the year, 1981.

15. In the Commissioner's report, the second schedule property is shown as "HBCG"; that the street is running on the Northern side of the suit properties and a channel was running in the second schedule property towards North and the same was closed by cement platform and that there is no door way in the southern portion of the house nor any cattle shed on the East-West portion of the entire suit property in "ABDE" are pointed out. Both the physical features noted in the Commissioner's report and sketch, the first appellate Court would ultimately arrived at the conclusion placing reliance on the Commissioner's report; that the plaintiffs have established their case that they have got title to the suit property by causing production of Exs.A1 and A2 and also showing about in their enjoyment of the suit properties from the year, 1962 onwards and would ultimately allow the appeal preferred by the appellants with costs setting aside the judgment and decree passed by the lower Court further decreeing the suit with costs as prayed for.

16. This Court does not find any valid or tangible reason to make inroads in the conclusions rendered by the lower Appellate Court but also the manner in which such conclusions have been arrived at in an acceptable way and has further held that the trial Court's interpretation of Ex.B4, particularly the boundaries given therein, which has not been substantially proved to be denoting Ex.A2 property also and therefore, relying on Ex.B2 boundaries, no conclusion could be arrived at and hence the first Appellate Court placing reliance on Exs.A1 & A2 and at Exs.C1 & C2, report and sketch of the Court Commissioner has arrived at a valid conclusion to allow the appeal preferred by the plaintiffs and therefore this Court does not find any reason to cause its interference into the well considered and merited judgment and decree passed by the lower Appellate Court and hence the substantial question of law has to be held that the plaintiffs' right or title or possession in the suit properties cannot be decided based on the boundary recitals of the Ex.B4, thus, answering the substantial question of law against the appellants and in favour of the respondents and hence the following decision:

In result,

(i) The above Second Appeal does not merit acceptance and the same is dismissed.

(ii) The judgment and decree dated 2.9.1988 rendered in A.S.

No.58 of 1985 by the Court of Subordinate Judge, Tenkasi, thereby reversing the judgment and decree dated 23.4.1984 rendered in O.S. No.167 of 1 983 by

the Court of District Munsif, Shencottah and decreeing the said suit, is confirmed.

(iii) However, in such circumstances of the case, there shall be no order as to costs.

Index: Yes

Internet: Yes

gr/asvm

To

1. The Subordinate Judge,
Tenkasi.

2. The District Munsif,
Shencottah.

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